



Litigation Update

Litigation Section News

December 2006

Rule of superior equities entitles insurer to subrogation.

State Farm sought to recover proceeds paid to its insured after a fire. The subrogation action was against those allegedly responsible for the fire. Summary judgment for defendants was reversed in *State Farm General Ins. Co. v. Wells Fargo Bank, N.A.* (Cal. App. First Dist., Div. 4; October 10, 2006) 143 Cal.App.4th 1098; [49 Cal.Rptr.3d 785, 2006 DJDAR 13721]. Where one party is in a better position to avoid the loss, the doctrine of superior equities entitles the other to indemnification.

Settlement of dispute renders appeal moot.

Where parties settle their dispute while an appeal is pending, the appeal becomes moot. And this is true even where the respondent failed to pay the moneys agreed to be paid under the terms of the settlement. *The Ebensteiner Co. Inc. v. The Chadmar Group* (Cal. App. Second Dist., Div. 5; October 11, 2006) 143 Cal.App.4th 1174; [49 Cal.Rptr.3d 825, 2006 DJDAR 13733]. The breach of contract claim is a new and different claim than the one involved in the appeal.

Note: Presumably plaintiff would have to file a new action for breach of contract. In the alternative, if the conditions of *Code Civ. Proc.* §664.6 are satisfied, plaintiff could bring a motion in the trial court to convert the settlement to a judgment and then execute on the judgment. (See, Weil & Brown, *Cal. Practice Guide: Civil Procedure Before Trial* (The Rutter Group 2005) ¶¶ 12:950 ff.)

Successive class actions barred by collateral estoppel.

In two earlier cases, courts held that May Department Stores area sales managers were not entitled to class action certification in their wage and hours claim because of lack of community of interest.

A new class action was filed in another court with another representative plaintiff. The trial court sustained defendant's demurrer on the basis that the doctrine of collateral estoppel precluded the new action. The Court of Appeal affirmed. *Alvarez v. May Department Stores Co.* (Cal. App. Second Dist., Div. 4; October 11, 2006) 143 Cal.App.4th 1223; [49 Cal.Rptr.3d 892, 2006 DJDAR 13767].

Where a pre-judgment order is appealable, an appeal from the subsequent judgment is time barred.

Most pre-judgment orders are not appealable. (They may be reviewable by way of a petition for extraordinary writ.) But some are made appealable by statute. An order granting, or denying, an anti-SLAPP motion (*Code Civ. Proc.* §426.16 ff.) is an appealable order. Therefore, the time for filing an appeal starts to run as soon as the order is filed. The appeal does not lie from the subsequently entered judgment. *Maughan v. Google Technology, Inc.* (Cal. App. Second Dist., Div. 1; October 11, 2006) 143 Cal.App.4th 1242; [49 Cal.Rptr.3d 861, 2006 DJDAR 13833].

Terrorist tactics are not protected by the First Amendment.

Where defendants engaged in conduct such as threatening nighttime visits, the court properly denied their anti-SLAPP motion. An anti-vivisection group, protesting the use of animals by a testing laboratory, visited employees at night, broke windows, vandalized cars, set off loud alarms, and placed excrement on the employees doorsteps. The owners of the laboratory sued. The trial court disagreed with defendants' claim that their conduct was protected under the First Amendment and denied their anti-SLAPP motion. Not surprisingly, the Court of Appeal affirmed. *Novartis Vaccines and Diagnostics, Inc. v. Stop*

Huntindon Animal Cruelty USA, Inc. (Cal. App. First Dist., Div. 2; October 12, 2006) 143 Cal.App.4th 1284; [50 Cal.Rptr.3d 27, 2006 DJDAR 13863].

Lawyers may execute on attorney fee judgment ordering payment to them.

Under *Fam. Code* §272(a) the court, in a marriage dissolution case, may order one party to pay the other party's attorney fees directly to the attorney. This gives lawyers in whose favor such an order was made, the right to obtain a writ of execution and to execute on the judgment even where their (former) clients disagree and want the money to go elsewhere. *IRMO Green* (Cal. App. Second Dist., Div. 3; October

The Litigation Section of the California State Bar is evaluating whether and how the *California Code of Civil Procedure* and *California Rules of Court* should be amended to deal with discovery of electronic information. The Section needs your help and asks that you take a few moments to participate in a member survey that seeks your experience and opinions about what is working and what is not working in this area. Your participation is anonymous unless you choose to share your contact information. The survey will take approximately 10 minutes.

To participate, [click here](http://www.surveyconsole.com/console/takesurvey?id=195323) or paste this web address into your web-browser: <http://www.surveyconsole.com/console/takesurvey?id=195323>

Your participation is important and greatly appreciated.

13, 2006) 143 Cal.App.4th 1312; [49 Cal.Rptr.3d 908, 2006 DJDAR 13899].

Deposition of opposing counsel requires "extremely good cause." Listing a number of reasons, including strong policy considerations, disruption of the litigation process, chilling of the attorney-client relationship, gamesmanship, and abuse, the Court of Appeal reiterated the proposition that "depositions of opposing counsel are presumptively improper and require 'extremely good cause.'" In *Carehouse Convalescent Hospital v. Sup.Ct. (Sims)* (Cal. App. Fourth Dist., Div. 3; October 23, 2006) 143 Cal.App.4th 1558; [50 Cal.Rptr.3d 129, 2006 DJDAR 14099], the trial court had ordered the deposition of plaintiff's lawyer to permit defendant to determine the manner in which the lawyer had calculated certain answers to interrogatories. The Court of Appeal reversed. Although not the primary basis for the court's decision, it would seem that the inquiry would also have invaded the lawyer's work product privilege.

Summary judgment may be granted for failure to comply with separate statement requirement. Where plaintiffs failed to file a proper statement of disputed facts and exceeded the page limitation (as required by *Code Civ. Proc.* §437c and *Cal. Rules of Court*, Rule 342) in their

opposition to a motion for summary judgment, the trial court properly granted the motion. In affirming the summary judgment, the Court of Appeal noted that the trial court had given plaintiffs an opportunity to correct the deficiencies and that they nevertheless failed to comply. Also, although summary judgments are normally reviewed de novo by the appellate courts, where the motion was granted because of failures to comply with procedural requirements, the judgment is reviewed under an abuse of discretion standard. *Collins v. Hertz Corporation* (Cal. App. Second Dist., Div. 8; October 10, 2006) 143 Cal.App.4th 1558; [50 Cal.Rptr.3d 129, 2006 DJDAR 14183].

Existence of contract to arbitrate is for judge to decide. What is the court to do when presented with a petition to compel arbitration and the opposition claims there is no valid contract? When the petition is accompanied by evidence of a written agreement to arbitrate, the court must decide the factual issue after conducting an evidentiary hearing. *Hotels Nevada v. L. A. Pacific Center Inc.* (Cal. App. Second Dist., Div. 2; November 7, 2006) 144 Cal.App.4th 754, [50 Cal.Rptr.3d 700, 2006 DJDAR 14722].

High intelligence is not a disability. A highly gifted 13-year old boy was admitted to college. His mother

demanding that the California Department of Education pay his college tuition under the federal *No Child Left Behind Act* (20 U.S.C. § 6301 *ff.*) and other statutes. She claimed that the Department of Education was required to pay for the special educational needs of her son because his high intelligence qualified as a "disability." The department disagreed and mother sued. Not too surprisingly both the trial court and the Court of Appeal rejected her argument. (*Levi v. O'Connell* (Cal. App. Third Dist.; November 7, 2006) 144 Cal.App.4th 700; [50 Cal.Rptr.3d 691, 2006 DJDAR 14717].

Fewer lawyers in the California legislature. Larry Doyle, director of the State Bar Office of Governmental Affairs, reports that, following the November 7th election, there will be even fewer lawyer-legislators in the state legislature. The lawyers newly elected to the California Senate are Darrell Steinberg (Sacramento) and Ellen Corbett (San Leandro). Those newly elected to the California Assembly are Jared Huffman (Marin), Anna Caballero (Salinas), Michael Feuer (Los Angeles), Paul Krekorian (Burbank), Mike Eng (Monterey), Charles Calderon (Montebellos), Anthony Adams (Hesperia), and Curren Price (Inglewood).

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